HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1536 OF 2005.

Chandrakant D. Teravkar,
Saibaba Nagar, Kadam Chawl,
New Amedkar Road,
Khar (East), Mumbai - 51. ..Petitioner.

Versus.

1. The manager,
The North Kanara GSB Co-op.
Bank Ltd, V.P. Road, Girgaon,
361, Laxmi Sadan, Mumbai 400 004.

2. The State of Maharashtra. ..Respondents.

Smt. Bhagyashri Jakhade for the petitioner.

Shri. R. S. Pai i/b M/s. Sanjay Udeshi & Co., for the respondent no.1.

Shri. M. H. Solkar, A.G.P. for respondent no.2.

CORAM: S.B.MHASE,J.

DATE : AUGUST 9, 2006.

ORAL JUDGMENT.

1. Heard. Rule returnable forthwith.

2. The petitioner has approached this Court under Article 227 of the Constitution of India challenging the order dated 21st February 2003, passed by the Industrial Court, Mumbai in Appeal No. (IC) 58 of 2003 in Application (BIR) No. 66 of 1995. The petitioner is employee of respondent

- bank and he was working as a peon. On a ground of the misconducts of absenteeism he was charge-sheet on 5.3.1994 and after holding an enquiry as contemplated under the standing orders applicable to the respondent - industry, petitioner was dismissed from the service on 31.12.1993. The petitioner had made an application with the employer as per the provisions of Section 42(4) proviso read with rule 53 of the Bombay Industrial Relations Act and Rules. Thereafter the petitioner had filed an application under section 78 read with 79 of the said Act of 1946, on 18.10.1994. The matter was contested by the respondents.

2. Initially, by order dated 7.12.2001 the application filed by the petitioner was allowed and the petitioner was granted re-instatement with continuity of service. So far as backwages were concerned, 50% of backwages with effect from 1.4.1994 till the re-instatement were granted. However, thereafter the respondent had challenged the said order before the Industrial Court by filing an appeal No. 2 of 2002. The said appeal was allowed and the order passed by the Labour Court was set aside and case was remitted to the Labour Court to consider as to whether the

dismissal order passed by the the opponent - Bank was under the standing order applicable to it and whether the delay caused deserves to be condoned under the provisions of Bombay Industrial Relations Act, 1946. After remand on the above points, the matter was decided by 11th Labour Court Bombay on 21.2.2003. The said Labour Court passed an order that the applicant has deadly failed to confer jurisdiction on that Court by failing to serve the appropriate approach notice as contemplated under section 42(4) proviso of the Bombay Industrial Relations Act, 1946 read with Rule 53 of the Bombay Industrial Relations Rules, 1947. The said order of the Labour Court was challenged by the petitioner by filing an appeal bearing (IC) No. 58 of 2003. The said appeal bearing (IC) No. 58 of 2003 was decided by the President of the Industrial Court, Bombay on 17.1.2004 and Industrial Court ultimately dismissed said appeal. Therefore, the petitioner has approached this Court invoking the jurisdiction of this Court under Article 227 of the Constitution of India as stated above.

3. The order of dismissal has been passed after holding an enquiry under the standing order. It is further clear from the prayers made in their

application that the petitioner is claiming re-instatement. Therefore the said item falls under Item 6 of Schedule-III. As the dismissal order is as per the standing orders and the prayer for the re-instatement is under item 6(i) of Schedule III, the provisions of sub-section (4) of section 42 will apply, which says that - In such case the employee intending any change in respect of any order shall make an application to the Labour Court. The proviso to sub-section (4) of Section 42 provides that "no application shall lie unless the employee or a representative union has in the prescribed manner approached the employer with a request for the change and no agreement has been arrived at in respect of the change within the prescribed period."

4. Thus it will be clear that the proviso prohibits an application being entertained by Labour Court in the absence of an approach notice being given in the prescribed manner. This contemplates that the proceeding can commence under sub-section (4) of section 42 of the Act by preferring an application by the employee or the representative union; the said employee or representative union is under obligation to

approach the employer with a request for change in the prescribed manner and that no agreement has been arrived at in response of the change in the prescribed period.

5. The procedure for approaching the employer under the proviso to sub-sectin (4) of Section 42 of the Act has been provided in Rule- 53 of the Bombay Industrial Relations Rules, 1947. The said Rule reads as under:

> "Any employee or a Representative Union desiring a change in respect of (i) any order passed by the employer concerned under Standing Orders of (ii) any industrial matter arising out of the application or interpretation of Standing Orders or (iii) an industrial matter specified in Schedule III shall make an application in writing to the employer. An application for change in respect of an order passed by the employer under Standing Orders shall be made within a period of three months from the date of such order. Where such application is made by an employee it may be made to the employer direct or through the Labour Officer for the local area or the representative of employees concerned. A copy of the application shall be forwarded to the Commissioner of Labour and in cases where such application is not made through the Labour Officer for the local area to that officer. Where an application has been made by an employee under sub-rule (1) the employer and the employee may arrive at an agreement within fifteen days of the receipt of the application by the employer or within such further

> period as may be mutually fixed by the employer and the employee or the Labour Officer for the local area or the representative of employees as the case may be. Where an application has been made by a Representative Union under sub-rule (1), the employer and the Representative Union may arrive at an agreement within fifteen days of the receipt of the application by the employer or within such further period as may be mutually agreed upon by the parties."

. Thus, Rule-53 of the Bombay Industrial Relations Rules, 1947 provides that the application requesting to effect a change in respect of an order or industrial matter prescribed in Schdule-III of the Act shall be made within a period of three months from the date of the order and thereafter the application shall be filed as provided under section 79 of the Act. Section 79(3) of the Act provides that:

> "An application in respect of a dispute falling under clause (a) of paragraph A of sub-section (1) of section 78 shall be made --
>
> (a) if it is a dispute falling under sub-clause (i) or (ii) of the said clause, within three months of the arising of the dispute ;
>
> (b) if it is a dispute falling under sub-clause (iii) of the said clause within three months of the employee concerned having last approached the employer under the proviso to sub-sectin

(4) of Section 42;"

It is further provided that Labour Court may for sufficient reasons, admit any application in respect of any dispute made to it under this sub-section after the expiry of the period of three months specified thereof under sub-clause (a) or (b), as the case may be.

6. The dispute in the present matter for the purpose of limitation under section 79(3)(b) of the Act, namely, the change desired in respect of the dismissal order and re-instatement, is covered under Schedule-III, item 6(1). Therefore, the period of limitation will have to be calculated as provided in clause (b) of sub-section (3) of section 79 of the Act. Therefore, the three months period will have to be calculated for the purpose of filing an application under section 79 from the date of last approach to the employer under sub-section (4) of section 42. So far as the filing of the application is concerned from the date of approach notice, namely, from 1.8.1994 the application is within time since it has been filed on 18.10.1994. However, the real controversy is different than the question of filing a delayed application under section 79. What is to be looked into the present matter that the jurisdiction of the Labour Court to entertain an application in

respect of the change to the standing order and/or any matter covered under Schedule-III arises only when the approach notice is given in the prescribed manner as provided in sub-section (4) of Section 42. As demonstrated in earlier paragraphs, the period of limitation for giving such application is three months or 90 days from the date of the order, and if within that time the application is made and no agreement is arrived at between the employer and the employee and/or representative union, the employee or representative union is entitled to approach the Labour Court. Therefore, unless there is compliance of Rule 53 read with proviso to sub-section (4) of Section 42 of the said Act, the Labour Court does not get jurisdiction to entertain the application and exercise of powers as provided under section 78 of the Act.

7. In the present matter, the dismissal order was passed on 31st December 1993 and the approach notice is given on 9.8.1994. In fact the last date on which the approach notice could have been given as prescribed under Rule 53 is 1st April 1994. Thus, within the said period the approach notice or application was not made by the applicant and it was made on 9.8.1994. That means there is a

delay of approximately four months in making compliance as provided under proviso to sub-section (4) of Section 42 of the said Act read with Rule 53 of the said Rules. Thus, in the result, the basic compliance in order to get vested jurisdiction in the Labour Court has not been made by the petitioner. Needless to say that the said provisions are mandatory, as has been held by this Court in the matter of **Suryabhan Baburao Sathe & Ors. v/s. Belapur Sugar & Allied Industries Ltd reported in 2000 II CLR 751 and Anant Bapu Kharat v/s. General Manager, B.E.S.T. Undertaking & Anr. reported in 2002 I CLR 350 .**

8. Learned counsel for the petitioner further tried to rely upon the judgment of Radhasingh Jokhasingh v/s. Hindustan Hosiery Mills & Ors, (1995 I CLR 939) wherein it has been observed that the period of three months as provided in Rule-53 shall not apply when the approach application is in respect of items provided in Schedule III. Thus, an attempt was made to pursuade this Court that the limitation as provided under Rule 53 is not applicable and thereby the reasoning adopted by the Labour Court and Industrial Court is erroneous one.

9. I am not in agreement with the learned counsel for the petitioner. It was not simplicitor a matter under Item 6 of Schedule III. Basically, the services of the appellant were terminated as a result of the dismissal order which was passed after holding departmental enquiry as provided under standing orders. If the said order is found to be illegal one, by way of a consequence re-instatement follows. Therefore, it was a matter pertaining to the standing order. Therefore, notice of three months as provided under Rule 53 was very much necessary and since such a notice was not given in time, both Courts have held that there is basic want of jurisdiction with the Court and, therefore, rejected the application.

10. Learned counsel thereafter tried to submit that the statutory provisions will be applicable to a person who is a sane. According to the learned counsel for the petitioner, from 9.8.1993 to 18.10.1994 the petitioner was under treatment of Dr. Naik, a psychiatrist. She submitted that the petitioner has lost a mental balance and he was not in a position to understand

what he is doing, therefore, under these circumstances to hold that the law will operate as against him will be an absurdity.

11. Learned counsel who appears for the respondent submitted that it is not necessary as to whether the provisions of law will stop to operate as against an insane person. According to the learned counsel for the respondent, the petitioner was not insane person during this period and he was a normal person. He submitted that the dismissal order was passed on 31.12.1993, however, the enquiry commenced on 9.3.1993, and during this period he had participated in the inquiry by remaining present before the Inquiry Officer. He further submitted that evidence of Dr. Naik points out that during the period, and till the approach notice was given he was a person in position to understand the affairs of the world and would have within time complied with the provisions as laid down in proviso of Section 42(4) of the Act read with Rule 53 of the Rules.

12. For the said purpose this Court perused the evidence of Dr. Naik who was examined before the Labour Court. It transpires from the evidence

of Dr. Naik that the petitioner was under treatment from 9.8.1993 to 6.2.1996. Dr. Naik has stated that the petitioner had difficulty in relations with petitioner's (his) wife and he (Dr.Naik) has evaluated the mental status of the petitioner. He further stated that the behaviour, thinking, mode and body functioning of the petitioner were disturbed and petitioner had disturbances in his occupational and other personal relationship. Ultimately, Dr. Naik concluded that the petitioner was suffering from depression. In cross examination, Dr.Naik admitted that he has not given advice to the patient to take rest and that he has never advised patients to take leave on the basis of medical certificate. The important admission which has been given by Dr.Naik is that, when question was asked whether such persons can attend job when they are under treatment; Dr.Naik has answered that such persons can attend the job when they are receiving medications. All this evidence taken together shows that even though for a moment it is accepted that the petitioner was taking treatment of Dr.Naik, he was a normal person who participated in the departmental enquiry.

13. It is further to be noted that Dr. Naik

has stated that after 1996 also the petitioner has taken treatment when the matter was prosecuted in the Labour Court, and in that circumstance if the petitioner was under mental disability then he should have prosecuted the said application by/through his next friend, because in a proceeding wherein a party is an insane person the matter is to be prosecuted by next friend. But the fact remains that in the Labour Court he came forward for deposing and even he has faced cross examination. Taking all this evidence together in respect of so called evidence of petitioner, it is a story made out for the purpose of litigation and to get condonation in the matter. There is no substance in the case made out by the petitioner and thereby incompetent to initiate and make compliance of the provisions. Therefore, ultimately result is that the petition is without any merit and it deserves to be dismissed. Petition is accordingly dismissed. Rule is discharged.

(S.B.MHASE, J.)

:sac/2006/single.